

No. 98-31351, No. 98-31359

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LA ACORN FAIR HOUSING and GENE LEWIS,

Plaintiffs-Appellees-Cross-
Appellants

v.

DANNY LEBLANC,

Defendant-Appellant-Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING APPELLEES IN NO. 98-31351 URGING AFFIRMANCE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
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STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether, in a suit finding a defendant liable for a violation of the Fair Housing Act, 42 U.S.C. 3601, et seq., an award of punitive damages may be proper absent an award of compensatory or nominal damages.

IDENTITY AND INTEREST OF THE AMICUS CURIAE

The Attorney General has substantial responsibilities for enforcement of the Fair Housing Act, 42 U.S.C. 3601, et seq. Pursuant to 42 U.S.C. 3612(o), the Attorney General is required to file a civil action for enforcement when authorized to do so by the Secretary of HUD. In such a civil action, the United States is authorized to seek the same monetary relief on behalf of any aggrieved person that such individual could obtain under a

private suit under 42 U.S.C. 3613, including "actual and punitive damages," 42 U.S.C. 3613(c); 42 U.S.C. 3612(o)(3). In addition, the United States is authorized by 42 U.S.C. 3614(a) to bring an action alleging a pattern or practice of discrimination in violation of the Fair Housing Act. In such an action, the United States is authorized to seek monetary damages on behalf of persons aggrieved by such discrimination. 42 U.S.C.

3614(d)(1)(B).^{1/} This Court's resolution of the issue whether punitive damages may be awarded under the Fair Housing Act in the absence of compensatory or nominal damages could affect the Attorney General's enforcement of the Act. The United States is authorized to file this brief pursuant to Fed. R. App. P. 29(a).

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Below

On June 14, 1996, plaintiffs Gene Lewis and Louisiana ACORN Fair Housing, a private nonprofit fair housing organization, brought suit against Danny Leblanc alleging that he refused to rent an apartment to Lewis because of his race, in violation of the Fair Housing Act, 42 U.S.C. 3601, et seq. (R. 1).^{2/} A jury

^{1/} The Attorney General may also bring an action upon referral by the Secretary of HUD under 42 U.S.C. 3612(g) where the Secretary has determined that a matter involves the legality of any State or local zoning or other land use law or ordinance. 42 U.S.C. 3614(b)(1)(A). In addition, the Attorney General may bring an action upon referral by the Secretary of HUD pursuant to 42 U.S.C. 3610(c), for appropriate relief with respect to the breach of a conciliation agreement. 42 U.S.C. 3614(b)(2)(A). In such actions, the court may award monetary damages to persons aggrieved. 42 U.S.C. 3614(d)(1)(B).

^{2/} ACORN also assisted Lewis in filing a complaint with the
(continued...)

trial was held on September 14-15, 1998. On September 15, the jury returned a verdict finding that Danny Leblanc had refused to rent an apartment to Gene Lewis on account of race, in violation of 42 U.S.C. 3604(a), and that Leblanc had indicated a preference not to rent apartments to black people, in violation of 42 U.S.C. 3604(c) (Tr. 140). The jury awarded Louisiana ACORN Fair Housing compensatory damages of \$1,076 (Tr. 141). Although the jury awarded Gene Lewis neither compensatory nor nominal damages, it awarded him \$10,000 in punitive damages (Tr. 141; R. 59).^{3/} That award was based upon its finding that Leblanc's refusal to rent an apartment to Lewis was "motivated by ill will, malice, or desire to injur[e]" Lewis or "by a reckless or callous disregard" for Lewis's legal rights" (Tr. 141). Judgment was entered in conformity with the jury's verdict on November 2, 1998 (R. 65).^{4/}

^{2/} (...continued)

United States Department of Housing and Urban Development (HUD), pursuant to 42 U.S.C. 3610(a), alleging discrimination in housing by Leblanc on the basis of race or color, in violation of 42 U.S.C. 3604(a). After investigation and attempted conciliation, the Secretary of HUD made a reasonable cause determination under 42 U.S.C. 3610(g)(1) and issued a charge of discrimination against Leblanc, pursuant to 42 U.S.C. 3610(g)(2)(A). Leblanc elected to have the charge resolved in a civil action in federal district court, pursuant to 42 U.S.C. 3612(a). Following this election, HUD authorized the Attorney General to file a civil action under 42 U.S.C. 3612(o).

^{3/} The citation "R. ___" indicates the number of a document in the record as listed on the district court's docket sheet.

^{4/} The United States brought suit on January 15, 1998, against Leblanc alleging that he refused to rent an apartment to Lewis because of his race or color, in violation of 42 U.S.C. 3604(a). The cases were consolidated in February 1998, but were later severed for purposes of trial (R. 16, 48). Following the return of the jury verdict in September 1998, the United States

(continued...)

On December 1, 1998, Leblanc filed a notice of appeal (R. 70). Louisiana ACORN Fair Housing and Gene Lewis filed a notice of appeal on December 7, 1998 (R. 71).

B. Statement Of Facts

On January 2, 1996, Gene Lewis, an African-American male, responded to an advertisement in a Lake Charles, Louisiana, newspaper for rental of a one-bedroom apartment by telephoning the number listed in the advertisement (Tr. 6-8). The owner of the apartment, Danny Leblanc, agreed to hold the apartment for Lewis if he paid a \$100 deposit (Tr. 8). Immediately after this phone call, Lewis went to view the apartment and to put down the requested deposit (Tr. 9). A female tenant showed Lewis the apartment, but told Lewis that she didn't think Leblanc would rent to him because he was prejudiced (Tr. 9-10). After meeting Lewis in person, Leblanc refused to accept the deposit, stating, "I just don't rent to you people" (Tr. 10).

When Lewis asked what Leblanc meant by "you people," Leblanc stated "black, color[ed], Negro, whatever you call yourself, I don't rent to y'all" (Tr. 10). He also said that if Lewis found another place, he would give Lewis a reference (Tr. 10-11).

Lewis consulted with LA ACORN, which conducted testing that confirmed Lewis's complaint (Tr. 52-58). On January 3, 5, and

^{4/} (...continued)
sought an injunction consistent with the verdict (R. 60). The district court entered an order in the consolidated cases on November 2, 1998, inter alia, enjoining Leblanc from "[d]iscriminating against any person in the terms, conditions or privileges of rental of a dwelling * * * because of race" (R. 65).

14, 1996, Leblanc rented three apartments, all to white persons (Tr. 94-96, 115-122, Pl. Exh. 3). One of those tenants, Elizabeth Chandler, testified that when she spoke to Leblanc on the telephone he asked her if she was white, and when she replied that she was, he stated, "That's good because I don't rent to those people" (Tr. 95).^{5/}

SUMMARY OF ARGUMENT

The district court properly entered judgment in accordance with the jury's verdict awarding punitive damages to Gene Lewis, despite the fact that the jury did not award Lewis either compensatory or nominal damages. Appellant's argument (Br. 9-16) that the Fair Housing Act does not permit an award of punitive damages in the absence of compensatory or nominal damages is incorrect and should not be adopted by this Court. As we argue below, since this suit was brought under the Fair Housing Act, federal, and not state, law governs the scope of the remedy. Federal courts construing the Fair Housing Act and other federal civil rights statutes, as well as federal statutes in non-civil rights contexts, have permitted an award of punitive damages notwithstanding an absence of compensatory damages, in order to vindicate the policies of federal law.

Congress has found that a jury's ability to award punitive damages under the Fair Housing Act is necessary to ensure effective enforcement of the Act. H.R. Rep. No. 711, 100th

^{5/} Chandler testified that she didn't "remember if he said black people or if he said the 'N' word" (Tr. 95).

Cong., 2d Sess. 40 (1988) (amending the Act to remove the \$1,000 limitation on punitive damages). Private attorneys who bring suits under the Fair Housing Act as "private attorneys general" play an important role in "vindicating a policy that Congress considered to be of the highest priority." Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972). Since "[m]ost fair housing cases do not involve major economic losses," Robert G. Schwemm, Housing Discrimination: Law and Litigation § 25.3(2) (b) at 25-19 (1990 & Supp. 1997), the availability of an award of punitive damages provides an incentive for private individuals to bring suits. Such suits help to effectuate the purpose of the Fair Housing Act of "replacing racially segregated housing with 'truly integrated and balanced living patterns.'" Woods-Drake v. Lundy, 667 F.2d 1198, 1201 (5th Cir. 1982), quoting Trafficante, supra. The availability of punitive damages also acts both to punish individuals who discriminate and to deter them and others from discriminating in the future. Smith v. Wade, 461 U.S. 30, 54 (1983).

ARGUMENT

THE FAIR HOUSING ACT PERMITS AN AWARD OF PUNITIVE DAMAGES IN THE ABSENCE OF AN AWARD OF COMPENSATORY OR NOMINAL DAMAGES

A. Punitive Damages Serve Important Statutory Purposes.

When Congress amended the Fair Housing Act in 1988, it found that, twenty years after the Act's passage, "discrimination and segregation in housing continue to be pervasive." H.R. Rep. No. 711, 100th Cong., 2d Sess. 15 (1988). Congress cited a national

study by the United States Department of Housing and Urban Development that concluded that black persons frequently encounter discrimination when seeking to rent or purchase housing. H.R. Rep. No. 711, supra, at 15. Congress also cited several regional studies, in which testers were used, confirming the fact that blacks face a significant probability of experiencing discrimination in both sales and rentals of housing. H.R. Rep. No. 711, supra, at 15.

Congress concluded that despite the "clear national policy against discrimination in housing" articulated in the Act, H.R. Rep. No. 711, supra, at 15, the Act "fail[ed] to provide an effective enforcement system to make th[e] promise [of the Act] a reality." H.R. Rep. No. 711, supra, at 13. This shortcoming was viewed by Congress as "the primary weakness in existing law." H.R. Rep. No. 711, supra, at 15. Specific weaknesses in the Act's enforcement by private persons included "limited financial resources of litigants and the bar" and "disadvantageous limitations on punitive damages." H.R. Rep. No. 711, supra, at 16.

One of the amendments made to strengthen private enforcement of the Act, therefore, was to remove the \$1,000 limitation on the award of punitive damages that had been part of the Act since it was passed in 1968. The House Report stated that "[t]he Committee believes that the limit on punitive damages served as a major impediment to imposing an effective deterrent on violators and a disincentive for private persons to bring suits under

existing law.” H.R. Rep. No. 711, supra, at 40. As amended, the Act provides that “the court may award to the plaintiff actual and punitive damages.” 42 U.S.C. 3613(c). Not only does the statutory language not condition an award of punitive damages upon the existence of an award of actual damages, but the House Report states that “[t]he Committee intends that courts be able to award all remedies provided under this section.” H.R. Rep. No. 711, supra, at 40 (emphasis added). The two kinds of damages provided by the statute serve different purposes. While actual damages serve Congress's purpose to compensate victims for actual losses caused by discriminatory housing practices, punitive damages are intended to further the equally important Congressional purposes of ensuring effective enforcement and deterrence. See Smith v. Wade, 461 U.S. 30, 54 (1983) (when considering punitive damages, court should focus on the character of the defendant's conduct, and whether it calls for deterrence and punishment over and above that provided by compensatory awards).

Imposing a requirement that compensatory damages are a necessary predicate to an award of punitive damages would frustrate Congress's purpose in allowing an award of punitive damages and in removing the monetary limitation on such awards when it amended the Act in 1988 to strengthen its enforcement mechanisms.

B. Federal Law, Not State Law, Governs The Scope Of Damages Under The Fair Housing Act.

It is well-established that where a cause of action arises out of a federal statute, federal, not state, law governs the scope of the remedy available to plaintiffs. Burnett v. Grattan, 468 U.S. 42 (1984); F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 127 (1974); Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep't Stores, Inc., 15 F.3d 1275, 1288 (5th Cir. 1994), cert. denied, 513 U.S. 1126 (1995); Garrick v. City & County of Denver, 652 F.2d 969, 971 (10th Cir. 1981) ("[f]ederal standards govern the determination of damages under the federal civil rights statutes"). The rationale for the rule is that it is unwise to subject "federal remedial legislation, and individual rights thereunder, * * * to the vagaries of local law." Gamewell Mfg., Inc. v. HVAC Supply, Inc., 715 F.2d 112, 114 (4th Cir. 1983). To do so would "fail to effect the purposes and ends which Congress intended." Basista v. Weir, 340 F.2d 74, 86 (3d Cir. 1965). See also Murphy v. Flagler Beach, 846 F.2d 1306, 1308 (11th Cir. 1988) (42 U.S.C. 1983) ("If a federal damages rule exists, it applies.").

C. Federal Law Permits An Award Of Punitive Damages Without Regard To Whether Compensatory or Nominal Damages Are Awarded.

The Courts of Appeals for the Seventh and Ninth Circuits have concluded that punitive damages can be awarded under the Fair Housing Act regardless of whether compensatory damages have been awarded. In Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972), aff'd on other grounds, sub nom. Curtis v. Loether, 415

U.S. 189 (1974), the district court in a Fair Housing Act case found that plaintiff had suffered no actual damages, but assessed punitive damages against the defendant in the amount of \$250. Although the court of appeals reversed the judgment because the district court had incorrectly denied defendant a jury trial, it concluded that if the trial court's finding of discrimination was accepted, "an award of punitive damages was authorized by the [Fair Housing Act] notwithstanding the absence of any actual loss to the plaintiff." 467 F.2d at 1112 & n.4, citing Basista v. Weir, 340 F.2d at 85-88 (suit under 42 U.S.C. 1983). In Fountila v. Carter, 571 F.2d 487, 492 (9th Cir. 1978), the court, citing Rogers v. Loether, also concluded that actual damages are not a prerequisite for awarding punitive damages.

This Court and other courts of appeals have reached the same conclusion under other federal civil rights statutes. In Ryland v. Shapiro, 708 F.2d 967, 976 (1983), this Court in an action under 42 U.S.C. 1983 held that the "societal interest in deterring or punishing violators of constitutional rights supports an award of punitive damages even in the absence of actual injury." See also McCulloch v. Glasgow, 620 F.2d 47, 51 (5th Cir. 1980) ("Punitive damages may also be awarded in a § 1983 action even without actual loss, despite local law to the contrary").

In Basista v. Weir, 340 F.2d at 85-88, the Third Circuit found that no actual damages were required for an award of punitive damages in a 42 U.S.C. 1983 case alleging illegal arrest

and wrongful incarceration by police officers. The court noted (340 F.2d at 88, citation omitted):

[T]here is neither sense nor reason in the proposition that such additional damages may be recovered by a plaintiff who is able to show that he has lost \$10, and may not be recovered by some other plaintiff who has sustained, it may be, far greater injury, but is unable to prove that he is poorer in pocket by the wrongdoing of defendant.

In Timm v. Progressive Steel Treating, Inc., 137 F.3d 1008 (7th Cir. 1998), the court upheld a jury's award of punitive damages in a Title VII sexual harassment suit despite the fact that the jury had awarded neither compensatory damages nor back pay. The court stated that "[e]xtra-statutory requirements for recovery should not be invented." Id. at 1010. In Hennessey v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1351-1352 (7th Cir. 1995), the court in a Title VII case found specifically that the state common law rule that "[p]unitive damages may not be assessed in the absence of compensatory damages" had no applicability to a federal civil rights action. See also Lebow v. American Trans Air, Inc., 86 F.3d 661, 670 n.11 (7th Cir. 1996) (plaintiff claiming unlawful discharge due to union organizing activities has a right to obtain punitive damages despite his failure to support claim for compensatory damages); Erwin v. County of Manitowoc, 872 F.2d 1292, 1299 (7th Cir. 1989) (punitive damages are recoverable under 42 U.S.C. 1983 even in absence of actual injury or compensatory or nominal damages); Anderson v. United Finance Co., 666 F.2d 1274, 1278 (9th Cir. 1982) (Equal Credit Opportunity Act). But see Kerr-Selgas v.

American Airlines, Inc., 69 F.3d 1205, 1215 (1st Cir. 1995) (reversing jury award of punitive damages on Title VII claim where jury did not award compensatory damages on that claim and plaintiff did not request nominal damages).^{6/}

Appellant's argument is largely based upon the Fourth Circuit's decision in People Helpers Foundation, Inc. v. Richmond, 12 F.3d 1321 (4th Cir. 1993). In People Helpers, a jury awarded a fair housing organization \$1 in punitive damages for a violation of the Fair Housing Act, but did not award compensatory damages. On appeal, the court acknowledged that, in enacting the Fair Housing Act, Congress "did not limit punitive damages to situations in which compensatory damages have been first awarded," id. at 1326. Finding that "[t]here is no established federal common law rule that precludes the award of punitive damages in the absence of an award of compensatory damages," ibid., it chose to follow the rule that prevails in the majority of the states, i.e., that punitive damages are prohibited when a fact-finder fails to award compensatory damages.

The rationale for the rule that prevails in the majority of states was summarized by the Fourth Circuit in People Helpers, 12 F.3d at 1327 (citation omitted):

^{6/} The First Circuit relied upon a Third Circuit decision, Cooper Distrib. Co. v. Amana Refrigeration, Inc., 63 F.3d 262, 281-283 (1995), which involved a claim under the New Jersey Franchise Practices Act and applied the state law on tort damages.

The reasoning supporting the majority rule is the belief that punitive damages are not appropriate in cases where a plaintiff has failed to demonstrate actionable harm. * * * When a plaintiff has failed to prove actionable harm, compensatory damages are not recoverable and logically it follows that punitive damages are also barred. To hold otherwise would create a windfall by allowing the recovery of damages when no actionable harm has been suffered.

Logically, however, the issue whether punitive damages should be awarded should be decided separately from the issue whether plaintiffs have suffered compensable harm. Compensatory damages are designed to measure the actual out-of-pocket harm or other concrete injury to the individual plaintiff. Punitive damages, on the other hand, focus on the injury to society caused by a reckless disregard of established anti-discrimination law and the need to promote society's interests by sending a strong message that deters future violations. Accordingly, punitive damages may well be appropriate even in the absence of a compensatory or nominal damages award.^{2/}

^{2/} After instructing the jury concerning compensatory damages, the court gave the following instruction concerning nominal damages (R. 57 at 9-10):

In addition, if you find that either or both Plaintiffs have suffered injury from unlawful discrimination, then they have been deprived of valuable statutory rights. In particular and in this instance, Lewis would have been deprived of the right to be treated equally with other people without regard to his race or color. While the precise value of such rights is difficult to assess, you may consider that the right to be free from unlawful discrimination is a very important right and you may award nominal damages which you believe are adequate to compensate for any deprivations of that right found from the evidence.

(continued...)

In this case, Lewis did not appear to have any out-of-pocket damages, and the court refused to permit testimony by a psychologist who prepared a psychological evaluation of Lewis (R. 41). Lewis emphasized his prayer for punitive damages in his testimony, stating that he sought "punitive damages also, besides my insult" because "he [Leblanc] needs to be punished for his actions" (Tr. 23). This Court has stated that "[t]he award of punitive damages 'involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent' to future illegal conduct." Gore v. Turner, 563 F.2d 159, 164 (5th Cir. 1977), quoting Lee v. Southern Home Sites Corp., 429 F.2d 290, 294 (5th Cir. 1970). The inability of the plaintiff to establish the existence of compensable harm does not negate the finding of a violation, and a jury should be free to make an award of punitive damages that recognizes the defendant's culpability.^{8/}

^{7/} (...continued)

During deliberations, the jury asked the court for clarification of the definition of compensatory and nominal damages (Tr. 137). The definition of nominal damages stated that they are a "trifling sum" recognizing a "technical invasion" of a plaintiff's rights (Tr. 138). Since the jury awarded substantial punitive damages, it may have thought a nominal damage award unnecessary.

^{8/} In support of its decision to follow state law, the court cited Eighth Circuit cases under other federal non-civil rights statutes. Those cases relied upon state damages law in resolving this issue. Air Line Pilots Ass'n Int'l v. Scheduled Skyways, Inc., 567 F. Supp. 171, 179 (W.D. Ark. 1983), modified on other grounds, 738 F.2d 339 (8th Cir.), dismissed on other grounds, 746 F.2d 456 (8th Cir. 1984) (Railway Labor Act, 45 U.S.C. 152); Cronin v. Sears, Roebuck & Co., 588 F.2d 616 (8th Cir. 1978) (Labor Management Relations Act, 29 U.S.C. 185(a)). Other
(continued...)

The discrimination found by the jury to have occurred in this case was egregious and involves behavior that has been unlawful for over thirty years. The jury's punitive damages award is designed both to punish that behavior and to send a strong message that will deter the behavior of Leblanc and other landlords who would not only refuse to rent an apartment to an individual based upon his race but would, in the process of doing so, add insult to that injury by making an explicit statement to that individual that his race was the reason for the denial of housing.

CONCLUSION

The judgment should be affirmed insofar as it effectuates the jury's award of punitive damages.

Respectfully submitted,

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^{2/} (...continued)
circuits, however, permit punitive damages without compensatory awards, e.g., Shea v. Galaxie Lumber & Construction Co., 152 F.3d 729, 736 (7th Cir. 1998) (FLSA retaliation claim); Lebow v. American Trans Air, Inc., 86 F.3d 661, 670 n.11 (7th Cir. 1996) (Railway Labor Act).

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies that this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b). Exclusive of the exempted portions in 5th Cir. R. 32.2.7.(b)(3), the brief contains words in monospaced typeface. The brief has been prepared in monospaced typeface using Wordperfect 7.0, with Courier typeface at 10 characters per inch (12-point font). If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word printout. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32.2.7, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 1999, I served two copies of the foregoing Brief for the United States as Amicus Curiae Supporting Appellees in No. 99-31351 and Urging Affirmance, by United States mail, postage prepaid, on:

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